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CASE NO._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

MARY WILSON,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent .

PETITION FOR WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEALS STATE OF FLORIDA

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102 PP

QUESTION PRESENTED

Does a state statute deny due process of law when it allows an individual, by simple signature, to waive her right to a hearing on involuntary commitment when that individual has refused voluntary commitment, is incapable of determining if commitment is necessary, and is mentally ill?

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Opinion Below

The opinion of the Second District Court of Appeals, State of Florida (App. A, infra.) is reported at 453 So.2d 413. The opinion of the Second District Court of Appeals, State of Florida on Motion for Rehearing (App. C, infra.) and the Order of the Supreme Court of Florida denying Petition for Review (App. D, infra.) were not officially reported.

Jurisdiction

The judgment of the Second District Court of Appeals, State of Florida was entered on August 1, 1984. A Petition for Review was timely filed before the Florida Supreme Court and denied on December 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Statutes Involved

Section 394.467(2), Florida Statutes

(App. G, infra.) is challenged as repugnant to the due process clause of the United States Constitution, Amendment XIV, Section 1.

STATEMENT OF THE CASE

A. Background

A Petition for Involuntary Placement of Mary Wilson to the Northeast Florida State Hospital was filed on March 22, 1983 in the Circiut Court for the Thirteenth Judicial Circuit, State of Florida.

Mary Wilson was alleged to be mentally ill. She was alleged to have refused voluntary placement for mental health treatment. She was allged to be unable to determine for herself whether placement was necessary.

On the same date that the Petition was filed, the Circuit Court was notified that Mary Wilson had waived her right to a hearing on involuntary placement (See App.

E). The waiver was undated. The waiver was witnessed by an individual who has never been identified. The waiver was "certified" by a doctor who has never been identified.

On March 23, 1983, ex-parte and without a hearing the Honorable Benjamin C. Sidwell, Circuit Court Judge ordered the involuntary placement of Mary Wilson to the Northeast Florida State Hospital.

Shortly thereafter, the Public Defender learned from a telephone inquiry from an out of town newspaper reporter that an indigent retarded woman without any mental illness had been involuntarily committed to a state hospital without a hearing. That woman was Mary Wilson.

The Public Defender interviewed Mary Wilson. When told that she was going to the state hospital she started crying and asked why. She related that she had been

sent there before and hated the place. When shown the Waiver of Hearing and asked why she had signed it she replied that she did not know what it was and did not remember signing it.

The Public Defender telephoned the State Mental Hospital and inquired about Mary Wilson. The admissions director confirmed that Mary Wilson had been involuntarily committed before, that she was retarded, and that she was not mentally ill. He offered to provide two expert witnesses and stated that he would not accept her again unless threatened with direct contempt of court.

The Public Defender filed, on April 8, a Motion to Vacate Order for Involuntary Placement, Schedule Hearing on Involuntary Placement and Appoint the Public Defender. That motion was never heard nor decided.

The Public Defender filed, on April

12, 1983, the Second Motion to Vacate Order for Involuntary Placement, Schedule Hearing on Involuntary Placement, and appoint the Public Defender (hereafter referred to as the "Second Motion to Vacate"). On April 13, 1983, that Motion was summarily denied without an opportunity to be heard. The Order of Denial stamped in the upper right hand corner of the Second Motion to Vacate is inaccurate. The Motion was considered but it was never heard and the Public Defender was never allowed to present evidence or speak on behalf of Miss. Wilson.

A Notice of Appeal from the denial of the Second Motion to Vacate was timely filed, Mary Wilson was adjudicated insolvent by the Circuit Court, and the Public Defender was appointed to prosecute her appeal to the Second District Court of Appeal, State of Florida.

The Second District Court of Appeal affirmed the trial court's denial of the Second Motion to Vacate (App. A). A timely Motion for Rehearing was filed on June 29, 1984 (App. B). The Motion for Rehearing was denied on August 1, 1984 (App. C). A timely Petition to Invoke Discretionary Jurisdiction was filed with the Florida Supreme Court on September 10, 1984. The Florida Supreme Court, with Justice Shaw dissenting, declined to accept jurisdiction by Order dated December 21, 1984.

B. Timeliness

The time allowed for filing a Petition for Certiorari in a civil matter pursuant to 28 U.S.C. 1257(3) is ninety (90) days from the entry of the judgment below. The judgment sought to be reviewed was not entered until Petitioner's Motion for Rehearing was denied by the Second District Court of Appeal, State of Florida, on

August 1, 1984.

However, this date is not the date from which the time for filing in the Supreme Court is computed. Where an even higher state court is petitioned to invoke discretionary jurisdiction, but refuses to do so, the time runs from the date of the refusal to review. American Railway Express Co. v. Levee, 263 U.S. 19, 20 - 21. The Florida Supreme Court did not refuse to invoke its discretionary jurisdiction until December 21, 1984 (App. D). This Petition for Writ of Certiorari was docketed before the expiration of ninety (90) days from December 21, 1984. Thus it is timely.

C. The Federal Question

The federal question of the denial of due process of law was raised at the trial level, with citations to Supreme Court case law, by written argument in support of the Second Motion to Vacate (App. F, at F-2).

The federal question was raised at the appellate level by written argument in support of her appellate brief to the Second District Court of Appeal (App. H, at H-6) and in support of her Motion for Rehearing (App. B).

The federal question was presented to the Florida Supreme Court by reference to attached copies of Petitioner's appellate brief to the Second District Court of Appeal (App. H) and to her Motion for Rehearing (App. B). The Florida Supreme Court declined to accept jurisdiction to decide the federal question.

REASONS FOR GRANTING THE WRIT

Mary Wilson is a retarded individual operating at an I.Q. level of approximately 55. She has no mental illness and yet under Florida law she was involuntarily committed ex-parte and without a hearing, to

a state hospital as a mentally ill patient adjudicated dangerous to herself.

This was accomplished because Florida Statute 394.467(2)(a) allows a person who has refused voluntary commitment, who is incapable of determining if commitment is necessary, and who is alleged to be mentally ill, to waive the right to a hearing on the need for involuntary commitment (G-3).

The statute speaks of waiver by "express and informed consent" and yet the facts of this case pointedly reveal the meaninglessness of the phrase when applied to indigent individuals with mental problems. Examination of the "express and informed consent" that Mary Wilson executed (E-1) shows that it was not even dated. Furthermore, when questioned about the document Miss Wilson had no idea of what it was or what it meant.

This Court may also be interested in knowing that Mary Wilson executed the waiver in printing. She is so mentally retarded that at age 35 she was still incapable of signing her name in script.

I realize that counsel for the State of Florida may object to some of the facts presented herein because they are "not of record". Yet the State of Florida should be estopped from any such objection. That these facts were not known to the trial court and were never allowed to be known is the very evil of which the Petitioner complains.

Yet, because of the putative "knowing and intelligent waiver" executed by Mary Wilson, she was committed to a state hospital for the insane. The conditions of forced mental treatment are not unknown to this Court. Patients are subject to the

administration of massive doses of mind altering drugs and must closely cohabit with other dangerous and mentally ill patients. Accordingly, this Court has characterized forced mental treatment as a "massive curtailment of liberty". Humphrey v. Cady, 405 U.S. 504, 509, 92 S.Ct. 9048, 31 L.Ed. 2d 394 (1972).

At issue here is whether the State of Florida can continue to impose the massive curtailment of liberty associated with forced mental treatment on individuals such as Mary Wilson without a hearing and based solely upon a signed waiver, with no procedural safeguards whatsoever to insure that the waiver is indeed "knowing and intelligent".

The State of Florida has responded in the Courts below that the statute is constitutional because it provides for post commitment proceedings by the patient or,

if they exist, his guardian or representative (A-4). Petitioner's reply that such procedures do not remedy the fully completed constitutional injury (B-10) has fallen on deaf ears.

At one time the mentally ill were incarcerated for forced mental treatment solely on the basis that they were mentally ill. That practice was stopped by this Court when it held that a state cannot constitutionally confine, without more, a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing family or friends. O'Connor v. Donaldson, 422 U.S. 563, 576, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975).

Prior to the O'Connor decision, Florida law allowed the forced treatment of the mentally ill on the basis that they needed treatment and lacked the insight to seek it. § 394.201(2)(b) Fla. Stat. (1971);

§ 394.467(1)(b) Fla. Stat. (1973) § 394.467 (1)(b) Fla. Stat. (1975). Subsequent to the O'Connor decision, Florida amended its mental health law, bringing the commitment criteria into compliance with this Court's ruling. Florida Session Law, Chapter 79-298, Section 9 (1979).

However, what has happened to Mary Wilson vividly illustrates the danger inherent in the Florida Statutes that individuals who do not meet the constitutional requirements set by this Court will continue to be wrongfully committed to forced confinement and mental treatment.

How many other retarded people have been wrongfully committed after "knowing" waivers is unknown. How many mentally ill who are not dangerous to themselves or others have been wrongfully committed after "knowing" waivers is unknown. A great many of the individuals who are subject to com-

pulsory mental health statutes are indigent homeless derelicts who not only are without "willing" family or friends, but without family or friends whatsoever. They are the people who sleep under bridges and eat out of garbage cans. They are the flotsom and jetsom of our society; irritating, annoying, an embarrassment to our society and living testimony to the failure of our governments to cope with the problem of mentally ill indigents.

These people live as they do because of mental illness. Yet, even in their illness, they value liberty and they loathe confinement in the wretched institutions into which they are forced, a result which they should not theoretically need to fear subsequent to the O'Connor decision. Yet, the danger still exists when they can be committed without a hearing simply because some unidentified doctor on some unidenti-

fied date has had them sign a paper they do not understand.

The State of Florida responds, "So what?" After they are committed, guardians, family or friends can ask for a subsequent hearing for their release (A-4). How does that cure the unconstitutional deprivation of liberty already committed?

Look also to the facts of this case. Where was the guardian who came forward to seek Mary Wilson's release? Where was the representative? Where did family or friends come forward? Mary Wilson and her plight were discovered only by the fortuitious fact that a newspaper reporter happened to bring her to the attention of the Public Defender.

The danger is too great to be ignored. Without relief from this Court, without some mandate requiring Florida to insure by procedure that waivers are truly

"knowing and intelligent", those who are mentally ill but not dangerous to themselves or others and even some who are not mentally ill at all but merely retarded will continue to be forced into mental institutions without due process. The message of O'Connor will be lost.

CONCLUSION

A state statute denys due process of law when it allows an individual by simple signature to waive her right to a hearing on involuntary commitment when that individual has refused voluntary commitment, is incapable of determining if commitment is necessary, and is mentally ill.

Accordingly, Petitioner prays that this Honorable Court grant this, her Petition for Writ of Certiorari, declare Florida Statute § 394.467(2)(b) unconstitutional, vacate her Order of Involuntary Commitment,

and provide what other and further relief as may be just and proper.

Respectfully submitted,

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CASE NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

Mary Wilson

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SECOND DISTRICT COURT OF APPEALS
STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5TH day of March, 1985, three copies of the Petition for Writ of Certiorari in the above styled cause were mailed postage prepaid to the Office of the Attorney General, State of Florida, Civil Division, Suite 1501, The Capitol, Tallahassee, Florida 32301. I

also certify that all parties required to be served have been served.

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Thirteenth Judicial Circuit
State of Florida
Counsel for Petitioner

Appendix A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

MARY WILSON,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 83-1071
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

Opinion filed June 15, 1984.

Appeal from the Circuit Court

for Hillsborough County:

Benjamin C. Sidwell, Judge.

Judge C. Luckey, Jr., Public

Defender, and Gary G. Graham,

Assistant Public Defender,

Tampa, for Appellant

Jim Smith, Attorney General,

and Dean C. Kowalchyk, Assistnat Attorney General, Department of Legal Affairs, Tallahassee, for Appellee.

LEHAN, Judge.

Appellant appeals from an order denying her motion to vacate an order of involuntary placement for treatment of mental illness, entered under section 394.467, Florida Statutes (Supp. 1982), and to schedule a hearing on the need for involuntary placement. We affirm the order denying the motion.

A petition for appellant's involuntary placement to the Northeast Florida State Hospital was filed on March 22, 1983, in the Circuit Court for Hillsborough County. Also filed was a document indicating that appellant had waived her right to a hearing on the petition. On March 23,

1983, without a hearing, the court ordered the involuntary placement of appellant.

In April 1983, the public defender filed in the Circuit Court for Hillsborough County the motion to vacate the order for involuntary placement and to schedule a hearing on involuntary placement. Grounds alleged were that section 394.467 (2)(a), Florida Statutes (Supp. 1982) (identical to the corresponding provision in the 1983 statutes), which allows a waiver of a hearing by a person suoject to involuntary placement, is unconstitutional. Appellant argues that the criteria for involuntary placement under

section 394.467(1)(b) are inconsistent with the ability to give a knowing and informed waiver of a hearing.

We decline to address the constitutional argument presented by appellant because we find that there was available to appellant another remedy by which to get a hearing on her need for placement. See Singletary v. State, 322 So. 2d 551, 552 (Fla. 1975). Section 394.467(2)(b) provides that a person who has waived a hearing, or his guardian or representative, may apply for a hearing on the need for involuntary placement at any time within six months of the date of the involuntary placement certificate. The petition is to

be filed in the county in which the person is involuntarily placed.

Thus, by filing a petition pursuant to section 394.467(2)(b) in the proper county, appellant could have had the hearing she requested. Appellant did not do so, and we affirm the denial of appellant's motion.

We also note that under section 394.467(4) a patient may request a hearing at six-minth intervals if continued placement is requested by the administrator of the hospital facility. For this additional reason appellant has had the opportunity to have a hearing on the need for her involuntary placement.

AFFIRMED.

OTT, C.J., and SCHOONOVER, J., Concur.

Appendix B

IN THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT, LAKELAND, FLORIDA

MARY WILSON, Appellant,	)	
vs.	)	CASE NO. 83-1071
STATE OF FLORIDA Appellee.	)	

MOTION FOR REHEARING AND CLARIFICATION

COMES NOW the Patient by and through her undersigned attorney and moves this Honorable Court for a rehearing in the above styled cause pursuant to Fla. R. App. P. 9.330 and states with particularity the following points of law or fact which the Court has overlooked or misapprehended:

POINTS OF LAW

1. That the rule announced in Singletary v. State, 322 So.2d 551, 552 (Fla. 1975) hereinafter the "Rule" is discretionary and not mandatory.

2. That Fla. Stat. §394.467(2)(b) could not remedy the constitutional injury alleged by the Patient.

3. That Fla. Stat. §394.467(2)(b) could not provide the relief sought by the Patient.

4. That the Rule does not apply where "... there was available to Appellant another remedy...".

5. That §394.467(2)(b) does not require that "The petition is to be filed in the county in which the person is involuntarily placed.

6. That Mary Wilson did petition for a hearing as provided by §394.467(2)(b).

POINT OF FACT

7. That continued placement of the Patient was never requested pursuant to Fla. Stat. 394.467(4).

POINT OF CLARIFICATION

8. Why does the Second District Court of Appeal believe that Mary Wilson did not apply for a hearing pursuant to §394.467 (2)(b)?

ARGUMENT

POINT ONE

That the rule announced in Singletary v. State, 322 So.2d 551, 552 (Fla. 1975) hereinafter the "Rule" is discretionary and not mandatory.

The Court in Singletary stated the Rule as being, "... that Courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectivley disposed of on other grounds." Singletary at 552. Looking closely to the case law reveals that the Rule is more accurately stated as, "A Court will not, as a general rule, pass upon a constitutional question and decide a statute to be invalid, unless a decision upon that very point becomes necessary.". Economy Cash & Carry Cleaners v. Cleaning, Drying and Pressing Board, 174 So. 829, 832 (Fla 1937). (emphasis added)

The Rule is not absolute because a Court may reach the constitutional issue, even though not necessary, where it involves a matter of great public importance. Economy Cash & Carry Cleaners v. Cleaning Drying & Pressing Board, 174 So. 829, 832 (Fla. 1937); Ex Parte Lewis, 135 So. 147, 149 (Fla. 1931); Green v. State, 166 So.2d 585, 587 (Fla. 1964).

This exception applies both where the Statute is ultimately held valid and where the statute is ultimately held invalid. Compare Ex Parte Lewis, 135 So. 147, 151 (Fla. 1931) with Sadowski v. Shevin, 345 So.2d 330, 334 (Fla. 1977).

Mary Wilson's argument is that §394. 467(2)(a) Fla Stat. (1982 Supp.) is unconstitutional because it deprives allegedly mentally ill persons of their freedom without due process of law. Due process is denied because the statute which requires

the patient to be mentally ill, to have refused voluntary placement, and to be unable to determine for himself whether placement is necessary, also allows that same patient to waive the hearing on involuntary placement designed to insure that the above mentioned criteria exist. (§394.467 Fla. Stat.) (1982 Supp).

The constitutional issue raised by the patient's argument is of great public importance because it allows patients of questionable mental competence to waive the rights designed to protect them. This in turn results in the wrongful and inappropriate incarceration of individuals in state mental hospitals who are merely retarded or incompetent. In the instant case, the Public Defender intended to establish at the requested Hearing of Involuntary Placement the fact that Mary Wilson was a retarded woman functioning at an I.Q.

of 55 or less. The Public Defender also had available a psychiatrist and other mental health professionals from the state mental hospital who were prepared to testify that they knew Mary Wilson and that she was entirely inappropriate for treatment as a mentally ill person.

Unless and until §394.467(2)(a) Fla. Stat. is ruled unconstitutional, indigent citizens of this state will continue to be incarcerated in state mental hospitals without a hearing, without legal counsel, and without due process.

The deprivation of liberty which results from the confinement under a state's involuntary committment law is a "massive curtailment of liberty" (Humphrey v. Cady, 405 U.S. 504, 509 (1972)). I am confident that this Honorable Court will agree that

a massive curtailment of liberty without due process of law is a matter of great public importance. Indeed, such is the opinion of the Florida Supreme Court with respect to issues of civil commitment. In re Bryne, 405 So.2d 383, 384 (Fla. 1981) as well as the Third District Court of Appeal Clark v. State, 122 So.2d 807, 812 (3DCA 1960).

What has happened to Mary Wilson under the Florida Mental Health Act as it now stands is very likely to happen to a great many other persons as well. This danger coupled with the difficulty of detecting these individuals who are incarcerated without a hearing and without benefit of legal counsel, presents to this Honorable Court a matter of great public importance effecting the proper administration of justice throughout the State and justifies an exception to the Rule in this

case.

POINT TWO

That Fla. Stat. §344.467 (2)(b) could not remedy the constitutional injury alleged by the Patient

This Court has misperceived the constitutional injury alleged by the patient While still a patient at the Hillsborough Community Mental Health Center situate in Hillsborough County, Florida (R3), she was adjudicated mentally ill (R9) and placed under involuntary placement (R9) without the benefit of a hearing and without knowingly and intelligently waiving that hearing.

Mary Wilson lost her freedom on March 23, 1983 (R9). She lost her freedom in violation of the United State Constitution Amendment V and Amendment XIV.

A hearing held pursuant to Fla. Stat. §344.467(2)(b) could have prevented the continued deprivation of her constitution-

al rights. It would not, however, remedy the original injury, her loss of freedom in the first instance.

Consider, as an anology, the constitionality of a hypothetical law passed by the Florida Legislature which reads as follows:

Chapter 1984
ARREST OF TALL PERSONS

1984.001 Short Title - This chapter shall be known and cited as the Tall Person Law.

1984.002 Definitions.

(1) "Tall person" includes any male or female of any age who is greater than 5'10" in total height as measured without footwear.

(2) "Short person" includes all persons who

are not tall persons.

1984.467 Arrest authorized.

(1) Any short person may arrest and confine any tall person in the county jail without a warrant and without probable cause.

(2) A tall person incarcerated pursuant to §1984.467(1), his guardian, or representative may petition for a hearing on the issue of the tall person's need for incarceration at any time within six months of the date of his incarceration. The Petition for Hearing shall be filed in the

County in which the tall person is incarcerated.

It is obvious that §1984.467(1) is unconstitutional. It is just as obvious that §1984.467(2) does not remedy the constitutional injury inflicted upon a tall person under §1984.467(2). Finally, it could not be seriously argued that a tall person incarcerated pursuant to §1984.467(1) must first request a hearing pursuant to §1984.467(2) in order to preserve on direct appeal the federal constitutional issues involved. And yet, under constitutional analysis there is no difference between Fla. Stat. 394.467 and hypothetical Fla. Stat. 1984.467. Both allow an unconstitutional deprivation of liberty followed by an inadequate putative remedy.

POINT THREE

That Fla. Stat. §394.467 (2)(b) could not provide the relief sought by the Patient.

The Patient did not merely request a hearing. In her second Motion, the denial of which is appealed, she primarily, principally, and foremost directed a request to the Judge, who adjudicated her insane and ordered her involuntarily placed, to vacate his order on the basis of the unconstitutional nature of the law which allowed her freedom to be wrongfully deprived (R12).

Her purpose was twofold. First, to remove the stigma and to relieve her of the numerous possible negative collateral consequences attendant to an Order of Involuntary Placement.

Those possible negative collateral consequences have been recognized by the federal courts, Stamus v. Leon Hardt, 414

F. Supp. 439, 449 (S.D. Iowa 1976), and include:

1. Inability to obtain a driver's license, §322.05 Fla. Stat. (1983); Va. Code Section 46.1-360 (1950).

2. Inability to engage in lawful gambling, §849.04 Fla. Stat. (1983).

3. Difficulty in disposing of property and entering into contracts, 29 Fla. Jur.2d Incompetent Persons §156-161 (1981).

4. The consequence that, "... records of commitments to a mental institution will certainly be used in any subsequent proceedings for civil commitment." In re Ballay, 482 F.2d 648, 652 (D.C. Cir. 1973).

5. Restrictions on voting rights. Ohio Const. Art. V, Section 6; N. Car. Stat. Ch. 163, Section 56 (1972).

6. Disqualification for federal grand jury duty. 28 U.S.C. Section 1865(b)

(1970).

7. Inability to obtain a gun license. 22 D.C. Code Sections 3207, 3210(3)(a) (1967).

8. Inability to receive rehabilitative treatment as a retarded person. (See Affidavit of Peter D. Ostreich, Staff Attorney, The Governor's Commission on Advocacy for Persons with Developmental Disabilities, attached hereto as Exhibit ONE; note that developmental disability as used by Mr. Ostreich roughly translates to retardation)

While the legal authorities cited are not all Florida law, there is no reason to believe that Mary Wilson would not possibly move to any of the jurisdictions cited. In that event, it is possible that she would suffer the negative collateral consequences so cited. The standard applied in civil commitment proceedings is thus: "a

case is moot only if it is shown that there is no possibility that any collateral legal consequent will be imposed ...", Ballay at 651.

The second purpose of her Motion to Vacate her Order of Involuntary Placement was to establish precedent so that she would not be repeatedly subjected to the constitutional injuries she perceived.

This Honorable Court has stated that Mary Wilson did not apply for a hearing pursuant to Section 394.467(2)(b). It is assumed that this Court believes that Mary Wilson was involuntarily placed in Baker County at the time her Second Motion to Vacate Order of Involuntary Placement, Schedule Hearing on Involuntary Placement, and appoint the Public Defender was filed in Hillsborough County. It is further assumed that this Court believes that Mary Wilson could have filed for a hearing in

Baker County.

Assuming that Mary Wilson could have filed for a hearing in Baker County, nothing in §394.467(2)(b) purports to give authority to a judge in a foreign jurisdiction the power to vacate an Order of Involuntary Placement issued by another circuit The best Mary Wilson could have hoped to obtain, by filing for a hearing in a jurisdiction outside of Hillsborough County, would have been a finding that continued placement was unnecessary and an order of Release. Indeed, any argument that her initial order was invalid at the time that is was rendered would have been denied on the principle of collateral estoppel.

Thus, a hearing held pursuant to §394.467(2)(b) before any other Court than the Thirteenth Judicial Circuit in and for Hillsborough County could not have resulted in the primary, principal and foremost re-

lief requested. Even if she had been released by a foreign jurisdiction, she would have continued to be burdened by the stigma of an Order for Involuntary Placement and the fear of being committed again after unknowingly and unintelligently waiving her right to a hearing.

POINT FOUR

That the Rule does not apply where "... there was available to Appellant another remedy...".

The Rule as announced in Singletary v. State, 322 So.2d 551, 552 (Fla. 1975) is that "... courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds.". The Rule stated by this Court in its opinion dated June 15, 1984 is effectively that Courts should not pass upon the constitutionality of statutes if in the case in which the question arises there were other procedurally available remedies to the victim of the constituional injury. The Rule as expressed by this Court is one of the first impression and counsel for Appellant has been unable to locate any authority to support it.

Analysis of every case which has invoked the Rule would be impossible in the 15 days allowed for a Motion for Rehearing.

However, based upon the cases surveyed it is Appellant's position that "effectively disposed of on other grounds" means two things.

On the one hand, where the party challenging the constitutionality of a statute prevails on appeal, it means that the relief can be granted without looking to the constitutional issue. Singletary v. State, 322 So.2d 551 (Fla. 1975); People v. State, 287 So.2d 63 (Fla. 1973); Walsingham v. State, 250 So.2d 857 (Fla. 1971); Armstrong v. State, 178 So. 294 (Fla. 1938); Economy Cash and Carry v. State, 174 So. 829 (Fla. 1937); L. Maxcy v. Mayo, 139 So. 121 (Fla. 1981); Atlantic Coast Line R. Co. v. State Board of Equalizers, 94 So. 681 (Fla. 1922).

This definition of "effectively disposed of on other grounds" does not apply to Mary Wilson because this Court proposes to deny her the relief she requests.

On the other hand, where the party challenging the constitutionality of a statute is denied relief, then "effectively disposed of on other grounds" means that the party for one reason or another has failed to prove a constitutional injury. Analysis of several cases will bear out this definition:

1. Jones v. City of Sarasota, 89 So.2d 346 (Fla. 1956). Black Plaintiffs claimed that Sarasota Ordinance 728 was discriminatory in effect and therefore unconstitutional. The constitutional issue was not reached because Plaintiffs' complaint failed to state the necessary elements for a cause of action. Thus there was no constitutional injury.

2. State v. Bell, 91 So.2d 193 (Fla. 1956) County commissioners claimed that their salary of $4,800.00 per year was unconstitutionally set by C. 29752 Laws of Florida. The constitutional issue was not reached because the court noted that if C. 29752 were declared unconstitutional the commissioners would still only receive $4,800.00 per year. Thus there was no constitutional injury.

3. No. America Co. v. Green, 120 So. 2d 603 (Fla. 1960) Plaintiff corporation complained that if its stock transaction was an original issue of 104,000 shares that §201.05 Fla. Stat. was unconstitutional and the transaction tax was not due as billed. The constitutional issue was not reached because the court decided that the transaction was not an original issue. Thus there was no constitutional injury.

4. Bankers Life and Casualty Co. v.

Village of North Palm, 138 So.2d 378 (2DCA 1962) Bankers Life claimed its lands should be excluded from the municipality because the statute which authorized the municipality was unconstitutional. The constitutional issue was not reached because the court found that Bankers Life had for three years planned, financed, and participated in the development of the municipality. Accordingly, it was estopped from claiming injury by the doctrine of laches. Thus, there was no constitutional injury.

5. State v. Green, 174 So.2d 546 (Fla. 1965) State comptroller claimed that Navy was not due refund of excise tax because the statute under which it was collected was unconstitutional. The constitutional issue was not reached because the court concluded that even if the statute was declared unconstitutional the comptroller would have to return the tax.

Thus, there was no constitutional injury.

However, in the Mary Wilson case there is a clear and unequivocal constitutional injury. The Circuit Court of the thirteenth Judicial Circuit adjudicated her mentally ill and took away her freedom, without a hearing before a detached and neutral magistrate and without a knowing and intelligent waiver of her right to a hearing. The Court then refused to vacate its order despite the fact that it was based upon clearly unconstitutional process.

There is no principal of law which can "effectively dispose" of her complaint of constitutional injury because there is no basis whatsoever that she was not injured by the operation of §394.467(2)(a) Fla. Stat. (Supp. 1982).

Furthermore, the idea that "effectively disposed of on other grounds" is

equivalent to not having exhausted every other available remedy can be repudiated by reference once again to hypothetical statute §1984 Fla. Stat., Tall Person Law.

Consider a tall person incarcerated pursuant to §1984.467(1). He petitions for a hearing pursuant to §1984.467(2), and is denied release. He takes a direct appeal of that denial without an intervening Petition for Writ of Habeas Corpus. Under this Court's interpretation of the Rule, the tall person could not have his constitutional issue reached on direct appeal because "there was available to appellant another remedy by which to get a hearing on his need for placement."

Such a result points inexplicably to the conclusion that there is no requirement for a person aggrieved by an unconstitutional statute to exhaust all possible legal remedies before being allowed to

directly appeal the constitutional issue.

POINT FIVE

§394.467(2)(b) does not require that "The petition is to be filed in the county in which the person is involuntarily placed."

This Honorable Court in its opinion filed June 15, 1984, stated that a petition pursuant to §394.467(2)(b) "... is to be filed in the county in which the person is involuntarily placed.". A careful reading of the statute reveals the following:

1. At the time the Petition for Involuntary Placement is filed the Patient must receive a written notice that he may file a Petition for a hearing at any time. §394.467(2)(b)(1) Fla. Stat. (Supp. 1982).

2. At that time the Patient must be notified that he may Petition for a hearing in the county in which he is hospitalized. §394.467(2)(b)(3) Fla. Stat. (Supp. 1982).

3. The Petition may also be filed at

any time within six months in the county in which the patient is involuntarily placed. §394.467(2)(b) flush paragraph end of section. Fla. Stat. (Supp. 1982).

Thus when read in pari materia it is clear that §394.467(2)(b) provides two alternative jurisdictions for filing a petition for a hearing on the need for involuntary placement. The patient may file in the county in which he is involuntarily placed at any time within six months of the date of the certificate (Petition for Involuntary Placement) or the patient may file, at any time, a Petition in the county in which he was hospitalized at the time the Certificate was filed.

POINT SIX

Mary Wilson did petition for a hearing as provided by §394.467(2)(b).

At the time the Petition for Involuntary Placement was filed, Mary Wilson was hospitalized at the Hillsborough County Hospital, 3906 N. 30th Street, Tampa, Florida, situate in Hillsborough County (R3-5)(R6)(R7).

Mary Wilson's Second Motion to Vacate Order for Involuntary Placement, Schedule Hearing on Involuntary Placement, and Appoint the Public Defender was among other things a petition for a hearing on the need for involuntary placement. It was filed in the county in which she was hospitalized at the time the Certificate was filed.

Accordingly, Mary Wilson did file a petition pursuant to Section 394.467(2)(b) in the proper county and did not fail to

pursue that available remedy. Any other interpretation of the law or the facts would have to be based on an overly strained interpretation of the statute which considering the inherent justice of the patient's position is not justified even if it will avoid the difficult task of passing on the constitutionality of §394.467(2)(a).

POINT SEVEN

That continued placement of the patient was never requested pursuant to Fla. Stat. 394.467(4)

The record is completely devoid of anything to support the idea that a hospital administrator ever requested continued placement of Mary Wilson pursuant to Fla. Stat. 394.467(4). Since continued placement was never requested she could not have had the opportunity for a hearing pursuant to §394.467(4).

POINT EIGHT

Why does the Second District Court of Appeal believe that Mary Wilson did not request a hearing as provided by §394.467(2)(b)?

RELIEF SOUGHT

On the foregoing analysis and authority Appellant requests that this Honorable Court rehear this cause and grant the relief requested in her initial brief, and that it in any event clarify Point Eight.

Respectfully submitted,

GARY G. GRAHAM
P. O. Box 519
Inverness, FL 32651
904/344-2664
Attorney for Patient

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing and Clarification has been furnished by U.S. Mail to the OFFICE OF THE ATTORNEY GENERAL, Dean C. Kowalchyk, Civil Division, Suite 1501, The Capitol, Tallahassee, FL 32301 this 29th day of June,

1984.

GARY G. GRAHAM

Appendix C

C-1

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

SECOND DISTRICT

MARY WILSON Appellant v. STATE OF FLORIDA, Appellee.	)	CASE NO. 83-1071

Opinion filed August 1, 1984.

ON MOTION FOR REHEARING AND CLARIFICATION

PER CURIAM.

We have once more given careful consideration to the cogent arguments of Appellant, to which we had given exhaustive consideration prior to our opinion filed June 15, 1984. We have also given that same type of consideration to aspects raised for the first time in the Motion for Rehearing and Clarification.

Notwithstanding what we recognize to be exceedingly thought provoking points

made on behalf of Appellant which are well taken in a number of respects, we have again concluded that our previously filed opinion is correct.

Accordingly, the Motion for Rehearing and Clarification is denied.

OTT, A.C.J., and SCHOONOVER and LEHAN, JJ., concur.

Appendix D

D-1

SUPREME COURT OF FLORIDA

Friday, December 21, 1984

MARY WILSON, Petitioner, vs. STATE OF FLORIDA, Respondent.	CASE NO. 65,840 District Court of Appeal, 2d District - No. 83-1071

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, ACTING C.J., ALDERMAN, McDONALD and EHRLICH, JJ., Concur SHAW, J., Dissents

A True Copy

TEST:

Sid J. White
Clerk Supreme
Court

cc: Hon. William A. Haddad, Clerk
Hon. James F. Taylor, Jr., Clerk
Hon. Benjamin C. Sidwell, Judge

Gary G. Graham, Esquire
Dean C. Kowlachyk, Esquire

Appendix E

WAIVER OF HEARING FOR INVOLUNTARY PLACEMENT*
(Minors and Legally Incompetent May Not Waive Hearings)

Pursuant to the authority of Chapter 394.467(2), Florida Statutes, I, Mary L. Wilson, a patient in Hillsborough Community Health Center, Inc., 5707 N. 22nd St., Tampa, FL 31610, have been fully advised that I have a right to a hearing on the question of whether I should be involuntarily placed, that I may be represented by counsel at such hearing, that if I do not waive hearing, a hearing will be held regarding the information contained in the attached Petition for Involuntary Placement and Placement Certificate and that I may at any time within six (6) months of the date of the Placement Certificate, after waiving hearing, petition for a hearing on the question of involuntary placement.

I hereby waive my right for hearing with the understanding that the Petition for Involuntary Placement and Placement Certificate shall serve as authorization for my admission to a treatment facility for a period not to exceed six (6) months from the date of the Petition for Involuntary Placement and Placement Certificate.

THE PATIENT IS THE ONLY AUTHORIZED PERSON WHO MAY SIGN A WAIVER OF HEARING.

Witness /s/ (1) Patient Mary L. Wilson /s/

APPLICATION FOR ATTORNEY

I, _____,

hereby petition the Court to appoint an attorney to represent me at a hearing on whether I should be admitted for the purpose of involuntary placement.

I hereby verify that I do not have assets of any kind which would suffice for the payment of attorney fees for repre-

sentation in a hearing on the question of involuntary placement.

Date	(Patient) (Guardian) (Representative)

I certify that at the time this waiver of hearing was signed the patient was competent to and did understand the meaning of the effect thereof.

/s/ (2)
PHYSICIAN

(1) Signature on original document unintelligible

(2) Signature on original document unintelligible

Appendix F

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

MENTAL HEALTH DEPARTMENT

IN THE INTEREST OF)
)
MARY WILSON, A PATIENT)

MOTION HEARD, CONSIDERED AN
DENIED
4/13 19 83
CASE NO. 83-232
/s/
CIRCUIT JUDGE

SECOND MOTION TO VACATE ORDER FOR INVOLUNTARY PLACEMENT, SCHEDULE HEARING ON INVOLTARY PLACEMENT, AND APPOINT THE PUBLIC DEFENDER

The Patient's first MOTION TO VACATE ORDER FOR INVOLUNTARY PLACEMENT, SCHEDULE HEARING ON INVOLUNTARY PLACEMENT, AND APPOINT THE PUBLIC DEFENDER, having been denied a hearing, comes now the Public Defender who again requests this Honorable Court to Vacate the Patients Order for Involuntary Placement at the Northeast Florida State Hospital, schedule a hearing for her involuntary placement and appoint the Public Defender as her legal counsel.

FACTS

The facts upon which this motion is based are as follows.

1. Mary Wilson is alledged (sic) to be mentally ill. (See Exhibit A, page 1, item 1).

2. Mary Wilson has refused voluntary placement for mental health treatment. (See Exhibit A, page 2, item 2)

3. Mary Wilson is unable to determine for herself whether placement is necessary. (See Exhibit A, page 2, item 3)

4. Mary Wilson signed a waiver of hearing for involuntary placement. (See Exhibit B)

5. Mary Wilson was involuntary (sic) committed to the Northeast Florida State Hospital. (See Exhibit C)

ARGUMENT IN SUPPORT OF MOTION

The deprivation of liberty which results from confinement under a state's in-

voluntary committment law is a "massive curtailment of liberty". (Humphrey v. Cady, 405U.S. 504, 509 (1972) The United States Supreme Court has stated that:

"There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law". (O'Connor v. Donaldson, 422 U.S. 563, 580 (1975)) Accordingly the Florida Supreme Court has held that "Commitment must be justified on the basis of a legitimate state interest, and the reasons for commiting a particular individual must be established in an appropriate proceeding". (Shuman v. State, 358 So.2d 1333, 1335 (Fla. 1978)

The Florida legislature has attempted to provide an appropriate proceeding by way of the Florida Mental Health Act. (F.S.

394) However, what it has given in the way of due process by providing for a hearing on individual placement, it was taken away by Section 394.467(2)(a). That Section provides that, "In a proceeding involving a person 18 years of age or older, the hearing may be waived by express and informed consent in writing by the patient".

Under the Florida Mental Health Act a person may not be involuntary (sic) committed unless that person suffers from a manifest mental illness, has refused voluntary placement for treatment and is unable to determine for himself whether placement is necessary. (F.S. 394.467(1)-(3). It is manifestly inconsistent and a denial of due process to allow a mentally ill person, who is unable to determine for himself whether placement is necessary to simoultaneously (sic) refuse voluntary treatment and waive the right to a hearing on invol-

untary placement under the illusion of "informed consent".

Thus, the provision for waiver of the Hearing on Involuntary Commitment is unconstitutional on its face. Accordingly, this Honorable Court should refuse to involuntarily commit individuals without a Hearing on Involuntary Committment notwithstanding any waivers to the contrary.

Therefore, the Court should vacate Mary Wilson's Order for Involuntary Placement, schedule a Hearing on Involuntary Placement and appoint the Public Defender as her legal counsel.

In the instant case, new facts have come to the attention of the Public Defender which vividly illustrate the perils of denying due process to those who we seek to involutary (sic) commit. The admissions administrator at the Northeast

Florida State Hospital at McClenny, Florida is reluctant to admit Mary Wilson. His reluctance is based upon the fact that Mary was previously placed at McClenny and that a psychiatrist and other treatment staff at that facility are willing to testify that Mary does not suffer from a mental illness but rather is retarded, functioning at an I.Q. of approximately 55.

If this motion is granted the Public Defender, will attempt to prove the truth of these new facts which were not available to this Honorable Court because of the unconstitutional waiver of the patients right to a hearing.

Respectfully submitted,

JUDGE C. LUCKEY, JR.
PUBLIC DEFENDER

BY _____
GARY G. GRAHAM
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, County Courthouse Annex, Tampa, Florida, this 12th day of April, 1983.

BY _____
GARY G. GRAHAM
ASSISTANT PUBLIC DEFENDER

Appendix G

394.467 Involuntary placement.--

(1) CRITERIA.--

(a) A person who is acquitted of criminal charges because of a finding of not guilty by reason of insanity may be involuntarily hospitalized pursuant to the provisions of chapter 916 and the applicable Florida Rules of Criminal Procedure.

(b) A person may be involuntarily placed for treatment upon a finding by the court of clear and convincing evidence that:

1. He suffers from an apparent or manifest mental illness;

2. He has refused voluntary placement for treatment after sufficient and conscientious explanation and disclosure of the purpose of placement for treatment;

3. He is unable to determine for himself whether placement is necessary;

4.a. He is manifestly incapable of

surviving alone or with the help of willing and responsible family or friends, including available alternative services, and, without treatment, he is likely to suffer from neglect or refuse to care for himself and such neglect or refusal poses a real and present threat of substantial harm to his well-being; or

b. It is more likely than not that in the near future he will inflict serious, unjustified bodily harm on another person, as evidenced by behavior causing, attempting, or threatening such harm, including at least one incident thereof within the 20 days prior to the initiation fo the proceedings for involuntary placement;

5. All available less restrictive treatment alternatives which would offer an opportunity for improvement of his condition have been judged to be inappropriate.

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(2) ADMISSION TO A TREATMENT FACILITY.-

(a) A patient may be involuntarily placed in a treatment facility, after notice and hearing, upon recommendation of the administrator of a receiving facility where the patient has been examined. When a patient is not an inpatient in a receiving facility, the administrator of a designated receiving facility may make a recommendation for involuntary placement of a patient who has been given an examination, evaluation, or treatment by staff or the receiving facility or a private mental health professional upon receipt of the opinions referred to in paragraph (b). In a proceeding involving a person 18 years of age or older the hearing may be waived by express and informed consent in writing by the patient. In a proceeding involving a person under the age of 18, the hearing shall not be waived; however, if, at the hearing,

the court finds that attendance at the hearing is not consistent with the best interests of the patient, the court may waive the presence of the patient from all or any portion of the hearing.

(b) The recommendation must be supported by the opinion of a psychiatrist and the second opinion of a clinical psychologist or another psychiatrist, both of whom have personally examined the patient within the preceding 5 days, that the criteria for involuntary placement are met; however, in counties of less than 50,000 population, if the administrator certifies that no psychiatrist or clinical psychologist is available to provide the second opinion, such second opinon may be provided by a licensed physician with postgraduate training and experience in diagnosis and treatment of mental and nervous disorders or a psychiatric nurse. Such recommendation shall be

entered on an involuntary placement certificate, which certificate shall authorize the receiving facility to retain the patient pending transfer to a treatment facility or completion of a hearing. The certificate shall be filed with the court in the county where the patient is located and shall serve as a petition for a hearing on involuntary placement. A copy of the certificate shall be served on the patient and his guardian or representatives, accompanied by:

1. A written notice, in plain and simple language, that the patient or his guardian or representative may apply at any time for a hearing on the issue of the patient's need for involuntary placement if he has previously waived such a hearing.

2. A petition for such hearing, which requires only the signature of the patient or his guardian or representative for completion.

3. A written notice that the petition may be filed with a court in the county in which the patient is hospitalized and the name and address of the judge of such court.

4. A written notice that the patient or his guardian or representative may apply immediately to the court to have an attorney appointed if the patient cannot afford one.

The petition may be filed in the county in which the patient is involuntarily placed at any time within 6 months of the date of the certificate. The hearing shall be held in the same county, and one of the patient's physicians at the facility shall appear as a witness at the hearing.

Appendix H

IN THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, LAKELAND, FLORIDA

MARY WILSON, Appellant, v. STATE OF FLORIDA, Appellee.	APPEAL NO: 83-1071

BRIEF OF THE APPELLANT

JUDGE C. LUCKEY, JR.
PUBLIC DEFENDER
THIRTEENTH JUDICIAL CIRCUIT

BY: Gary G. Graham
Assistant Public Defender
Courthouse Annex
2nd Floor
Tampa, Florida 33602

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IN THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, LAKELAND, FLORIDA

MARY WILSON,	)	
	)	
Appellant,	)	
	)	
v.	)	APPEAL NO: 83-1071
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

STATEMENT OF THE CASE

(Deleted for purposes of this appendix)

STATEMENT OF THE FACTS

(Deleted for purposes of this appendix)

ARGUMENT

I

§ 394.467(2)(a) FLA. STAT. (SUPP. 1982) DENIES THE 14th AMENDMENT DUE PROCESS OF LAW BECAUSE IT ALLOWS THE PATIENT TO WAIVE THE RIGHT TO A HEARING FOR INVOLUNTARY PLACMENT (sic).

"The Fourteenth Amendment denies the State the power to deprive any person of life, liberty, or property, without due process of law." Duncan v. Louisiana, 391 U.S. 145, 147, 20 L.Ed. 491, 495 (1968).

The deprivation of liberty which results from confinement under a state's involuntary commitment law is a "massive curtailment of liberty". Humphrey v. Cady, 405 U.S. 504, 509, 31 L.Ed.2d 394, 402 (1972).

The United States Supreme Court has stated that:

"There can be no doubt that involuntary commitment to a mental hospital, like

involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law". O'Conner v. Donaldson, 422 U.S. 563, 580, 45 L.Ed.2d 396, 410 (1975). Accordingly the Florida Supreme court has held that "Commitment must be justified on the basis of a legitmate (sic) state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding". Shuman v. State, 358 So.2d 1333, 1335 (Fla. 1978).

The Florida Legislature has attempted to provide an appropriate proceeding by way of the Florida Mental Health Act. §394. 467(2)-(4) Fla. Stat. (Supp. 1982). However, what it has given in the way of due process by providing for a hearing on involuntary placement, it has taken away by § 394.467(2)(a). That Section provides

that, "In a proceeding involving a person 18 years of age or older, the hearing may be waived by expressed and informed consent in writing by the patient".

Under the Florida Mental Health Act a person may not be involuntary (sic) committed unless that person suffers from a manifest mental illness, has refused voluntary placement for treatment and is unable to determine for himself whether placement is necessary. § 394.467(1)-(3) Fla. Stat. (Supp 1982).

"It is too well established to require extended discussion that due process is not an inflexible concept. Rather, its requirements are determined in particular instances by identifying the interests of the individual and society." O'Connor, at 585.

In this case the interest of society is the compulsory hospitalization of dan-

gerous mentally ill individuals. The interest of the individual is in protection from wrongful compulsory hospitalization with the attendant consequences of exposure to others who are dangerous and mentally ill, to powerful psychotropic drugs and to possible electro-shock therapy.

The State's interest in allowing a waiver is to save the time and expense of unnecessary hearings. However, unlike criminal cases where waivers of a trial are routinely accepted because it is the norm for defendants to be competent, in mental health cases, by law, the patient must be both mentally ill, § 394.467(b)(1) Fla. Stat. (Supp. 1982) and unable to determine for himself whether placement is necessary § 394.467(b)(3) Fla. Stat. (Supp. 1982).

Under these existing criteria the danger of an individual unknowlingly sign-

ing a waiver become so great that the individuals interest in receiving a fair hearing outweigh the state's interest in avoiding the time and expense of the hearing.

This conclusion is further supported by the fact that an individual must refuse voluntary placement for treatment before he can be involuntarily placed. § 394.467(b)(2) Fla. Stat. (Supp. 1982). Thus in every Mental Health Act case where the patient signs a Waiver for Involuntary Placement the circuit court is faced with a direct conflict of the record. The patient has refused voluntary placement but has simultaneously waived the hearing designed to determine whether involuntary placement is appropriate.

The danger of allowing a patient under these criteria to waive his hearing is vividly illustrated by the case at hand. The new facts which the Public Defender

wanted to prove included the fact that Mary Wilson was mentally retarded having an I.Q. of only 55. The chance of other mentally retarded patients being misdiagnosed as mentally ill is great. The chance of other mentally retarded patients unknowingly signed (sic) a Waiver for Hearing on Involuntary Placement is just as great. Since the state's interest in compulsory hospitalization of dangerous mentally ill individuals is not served by the compulsory hospitalization of the mentally retarded the danger presented by allowing a waiver of the Hearing for Involuntary Placement is unjustified.

Another consideration against the fundamental fairness of allowing patients to waive their Hearing for Involuntary Placement is the fact that it makes it very difficult for their plight to be discovered. Most are indigent and many have no

family or friends. Those who have money can afford private treatment and rarely are involved in Mental Health Act proceedings. Those who have family or friends seldom meet the statuatory (sic) requirement that they be incapable of surviving with the help of willing and responsible family or friends. § 394.467(b)(4)(a) Fla. Stat. (Supp 1982).

Thus the typical patient who has waived the Hearing for Involuntary Placement is an indigent, homeless individual without family or friends who is ordered into the State Mental Hospital without even an opportunity to be represented by the Public Defender at a hearing. How many other Mary Wilsons have been wrongfully denied their hearings is impossible to know.

In conclusion, upon balancing the interest of the State and the individual

under these particular circumstances, it is clearly inconsistent and a denial of due process to allow a mentally ill person, who is unable to determine for himself whether placement is necessary, to simultaneously refuse voluntary treatment and waive the right to a hearing on involuntary placement, especially under circumstances where the waiver may be signed by persons who are incompetent for reasons other than mental illness.

CONCLUSION

On the basis of the foregoing reasoning, argument and authorities cited, Appellant requests that this Honorable Court vacate the Order for Involuntary Placement and release Mary Wilson from confinement.

Respectfully submitted

JUDGE C. LUCKEY, JR.
PUBLIC DEFENDER
THIRTEENTH JUDICIAL CIRCUIT

BY: /s/
Gary G. Graham
Assistant Public Defender
Courthouse Annex
Tampa, Florida 33602

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the Office of the Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida and to the Appellant, Mary Wilson, P. O. Box 2369, Buckingham Road, Fort Meyers, Florida 33905, this

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28th day of June, 1983.

Gary G. Graham

Office-Supreme Court, U.S.
FILED
MAY 31 1985
ALEXANDER L. STEVAS,
CLERK

(2)

CASE NO. 84-1463

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MARY WILSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEALS STATE OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

GERALD B. CURINGTON
Assistant Attorney General
Counsel of Record for Respondent

DEAN C. KOWALCHYK
Assistant Attorney General

Department of Legal Affairs
The Capitol, Suite 1501
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PREFACE

The only document referenced herein is the opinion of the court below, which is also reported at 453 So.2d 413 (Fla. App. 1984). This opinion is reprinted as Petitioner's Appendix A. For the convenience of the Court, references to that opinion will be made to the Petitioner's Appendix.

JURISDICTION

Jurisdiction is alleged by Petitioner pursuant to 28 U.S.C. §1257(3). Respondent denies that jurisdiciton is properly alleged.

A. TIMELINESS

Petitioner's motion is untimely because the pursuit of discretionary jurisdiction in the Florida Supreme Court was a sham. As will be discussed more fully below, the

instant cause was decided by the Florida Second District Court of Appeal (hereinafter "the Second District") on state procedural grounds independent of any federal question presented. Petitioner attempted to invoke the discretionary jurisdiction of the Florida Supreme Court pursuant to Fla. R. App. P. 9.030(2), which states that:

> . . . The discretionary jurisdiction of the Supreme Court may be sought to review:
>
> (A) decisions of district courts of appeal that:
>
> (i) expressly declare valid a state statute;
>
> (ii) expressly construe a provision of the state or federal constitution . . .

The order of the Second District states in relevant part that:

> . . . We decline to address the constitutional argument presented by appellant because we find that there was available to appellant another remedy by which to get a

> hearing on her need for placement
> . . .

Petitioner's Appendix at A-4. The opinion of the Second District does not rule on the validity of Florida's involuntary mental health hospitalization statutes, and further does not rule on a federal constitutional question. The Second District made its ruling on procedural grounds:

> . . . Thus, by filing a petition pursuant to section 394.467(2)(b) (Fla.Stat. 1982) in the proper county, appellant could have had the hearing she requested. Appellant did not do so, and we affirm . . .

Petitioner's Appendix at A-5.(statutory identification added).

Clearly, Petitioner's attempt to invoke the discretionary jurisdiction of the Florida Supreme Court was, at best, misguided. Petitioner should not now be allowed to use a totally meritless attempt

at discretionary review to toll the time for petitioning herein.

B. FEDERAL QUESTION

Respondent admits that issues of federal constitutional law were presented on appeal in this cause. However, as noted above, and as will be further discussed below, the case was decided by the Second District on state law procedural grounds. The procedure referenced by the court was not challenged by Petitioner below. Thus, while a federal question was presented below, the Second District did not reach the federal question, because adequate independent state grounds made the determination of the federal question unnecessary.[1] This Petition should be

[1] In Singletary v. State, 322 So.2d 551,552 (Fla. 1975), the Florida Supreme Court held that Florida courts should refrain from deciding cases on
[cont'd on next page]

denied because it does not present a federal question. Certiorari herein would amount to a review of a State decision regarding state procedure.

STATEMENT OF THE CASE

Respondent adopts Petitioner's statement of the case, with the following exceptions:

1) The record does not reflect a judicial determination that the witness to Petitioner's waiver cannot be identified.

2) The record does not reflect that the doctor who certified Petitioner's waiver cannot be identified.

3) The record contains no evidence that Petitioner was retarded, rather than mentally ill.

4) The record does not reflect that

---

constitutional grounds whenever non-constitutional issues are dispositive.

Petitioner does not recall waiving her right to hearing.

5) The record does not reflect that the admission director of the State hospital made a determination that Respondent was not mentally ill.

6) The record does not reflect that Petitioner's Second Motion to Vacate was "never heard". The record does reflect that the motion was ruled upon.

SUMMARY OF ARGUMENT

Certiorari review of this cause should be denied because the opinion of the lower court was based upon adequate independent state grounds.

CERTIORARI SHOULD BE DENIED

Petitioner was the subject of an involuntary mental health commitment

proceeding, pursuant to Chapter 394, Fla. Stat. (1982), which is also known as the "Baker Act." Petitioner seeks the certiorari review by this Court of the affirmance of the denial of a Motion to Vacate the order of involuntary mental health commitment. The Baker Act contains provisons for a hearing for those who oppose involuntary commitment. The act also provides, in §394.467(2)(a), Fla. Stat., (1983) that the hearing can be waived by "express and informed consent". Petitioner alleges that it was error for the Second District to affirm an order denying a Motion to Vacate because the statute improperly allowed her to waive her right to hearing. She offers as proof the allegation that she is mentally retarded, rather than mentally ill, and she admits that the facts which would support this allegation are not in the record. Her

counsel asserts that the State of Florida should be "estopped" from arguing that this Court's review should be restricted to the record because the inability to present them "is the very evil of which the Petitioner complains."[2]

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[2]The State of Florida also has an evil to complain of. That evil is the failure of counsel for Petitioner to make use of the procedures available within the Baker Act. The Second District affirmed the denial of Petitioner's Second Motion to Vacate because it was not properly filed. That court noted that:

> . . . section 394.467(2)(b) provides that a person who has waived a hearing, or his guardian or representative, may apply for a hearing on the need for involuntary placement at any time within six months of the date of the involuntary placement certificate . . . under section 394.467(4) a patient may request a hearing at six-month intervals if continued placement is requested by the administrator of the hospital facility. For this additional reason appellant has had the opportunity to have a hearing on the need for her involuntary placement.

Pet. App. at 4-5.

Even assuming, arguendo, that

[cont'd on next page]

This Court should decline to review the decision of the Second District because that decision does not present a federal question. In Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the Court stated that:

> . . . Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, has been the cornerstone of this Court's refusal to decide cases where there is an adequate and independent state ground . . .

103 S.Ct. at 3475; see also: Dept. of Mental Hygiene Cal. v. Kirchner, 380 U.S. 194, 85 S.Ct. 871, 13 L.Ed.2d 753 (1965).

The opinion of the Second District

Petitioner's counsel was unaware of the provisions of 394.467(2)(b) and 394.467(4) prior to the order of the Second District, he certainly should have become aware of them on or about June 15, 1984. Since that time, Counsel has had 4 opportunities to make use of 394.467(4). It is Petitioner, not the state, who should be estopped from presenting evidence not in the record where she has refused to avail herself of the opportunity to build a record.

occupies a scant five pages of Petitioner's appendix. The substance of that order is as follows:

> We decline to address the constitutional argument presented by appellant because we find that there was available to appellant another remedy by which to get a hearing on her need for placement. See Singletary v. State, 322 So.2d 551, 552 (Fla.1975) . . . by filing a petition pursuant to section 394.467(2)(b) (Fla. Stat. 1982) in the proper county, appellant could have had the hearing she requested. Appellant did not do so, and we affirm the denial of appellant's motion.

Pet. App. at 4-5.(statutory identification added). Where the state court can decide the matter on the basis of adequate and independent state grounds, and does so, any judgment by this court on the wisdom of that ruling would be, at best, an advisory opinion. The court below expressly declined to render a federal constitutional ruling because it was able to decide the

matter on the basis of unchallenged state procedural law. This court should decline to review that decision because it does not present a federal question.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that certiorari review of this cause be denied.

Respectfully submitted,

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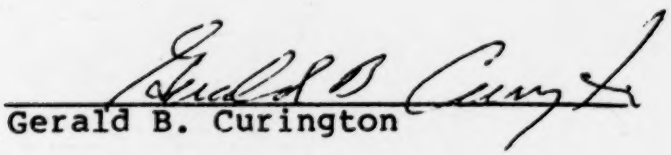
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing were served, via U.S. mail, on GARY G. GRAHAM, P.O. Box 519, Inverness, Florida 32651, this 30th day of May, 1985.



Gerald B. Curington